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No. 481

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

J. ELROY McCAW AND JOHN D. KEATING,
Petitioners,

vs.

EARL W. FASE, Tax Commissioner of the Territory of Hawaii,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (R. 135-147) is reported in ..... F.2d .....

The opinion of the Supreme Court of Hawaii (R. 51-121) is reported in 40 Haw. 121.

JURISDICTION

The petition for certiorari seeks review, under section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)), of a case which reached the Court of Appeals upon appeal from

the Supreme Court of Hawaii under section 1293 of the Judicial Code (28 U.S.C. 1293).[1]

On October 30, 1954 (R. 148) judgment of the Court of Appeals was entered affirming the judgment which the Supreme Court of Hawaii had entered June 8, 1953 (R. 123-124).

STATUTES AND RULES INVOLVED

There are set forth in the appendix the following statutes[2] and rules:

47 U.S.C. 153, subsections (a)-(g), (k) and (v), being a portion of section 3 of the Communications Act of 1934, 48 Stat. 1065, as amended 50 Stat. 189, 60 Stat. 1352. (The petition sets out only subsections (a), (b), (d) and (k), omitting the definitions of "Interstate communication" and "State.")

47 U.S.C. 606, subsections (c), (d) and (f), being a portion of section 606 of the Communications Act of 1934, 48 Stat. 1104, as amended 56 Stat. 18, 56 Stat. 1096, 61 Stat. 449. (This section of the Communications Act of 1934 is not set out in the petition. It is the one section that mentions state taxation.)

Section 5455 of Chapter 101, Revised Laws of Hawaii 1945, as amended by Acts 100 and 253, Session Laws of Hawaii 1945, and Acts 111 and 113 of the Session Laws of Hawaii 1947. (This is the section of the territorial tax law imposing the tax. There has been set forth in the petition the portion (subsection D) relating to radio broadcasting stations.)

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[1] The suggestion of the petitioners that an appeal be allowed under 28 U.S.C. 1257 (2) is regarded by the respondent as frivolous, inasmuch as petitioners appealed from the Supreme Court of Hawaii to the Court of Appeals for the Ninth Circuit and could not now, irrespective of the status of the Hawaiian court, take a direct appeal from the Supreme Court of Hawaii to this Court.

[2] Statutes are set out in the appendix as they read during the taxation periods involved and at the time this action was instituted.

Rule 10, Court of Appeals for the Ninth Circuit, being the same as the former Rule 11. (The petition sets out only paragraph 1 of this rule, but not paragraph 2.)

Rule 17, Court of Appeals for the Ninth Circuit, being the same as the former Rule 19. (This is the rule relating to printing of records. It is not set out in the petition.)

QUESTION PRESENTED

The question presented is:

Is the Territory of Hawaii without power to tax the business of radio broadcasting, when the tax is imposed upon the broadcasts transmitted by the Hawaiian station to the Hawaiian audience and measured by gross income derived solely from such broadcasting?

STATEMENT OF THE CASE[3]

On May 3, 1951 the petitioners filed in Law No. 21340 in the Circuit Court, First Judicial Circuit, their amended complaint (R. 3-27) in a suit brought pursuant to section 1575 of the Revised Laws of Hawaii 1945 (R. 22) to recover the sum of $7,637.33 paid under protest on March 21, 1951. The respondent has conceded that the suit was commenced within the period of thirty days after the protested payment, as provided by said section 1575 (R. 55).

The amended complaint alleged that the taxes so paid under protest were assessed upon the gross receipts from radio broadcasting by station KPOA, Honolulu, owned and operated by the petitioners (R. 5, 24). It attacked as illegal section 5455D of Chapter 101 of the Revised Laws of Hawaii 1945, under which the taxes were assessed, asserting that all radio broadcasting is interstate commerce and that Congress has pre-empted the subject matter of radio broadcasting to the exclusion of state and territorial taxation (R. 3-23).

[3] Petitioners' "Statement of the Case" is replete with argument, and in many respects is not in conformity to the record. Respondent here submits a complete restatement of the case.

Chapter 101 of the Revised Laws of Hawaii 1945, known as the "general excise tax" or "gross income tax" law, is a statute imposing a tax upon business in the Territory measured by the gross receipts thereof. It applies to sales, services, and in general all types of business as shown by section 5455 thereof (App. 4-6). Subsection D of section 5455 relates to radio broadcasting stations (App. 5).

Petitioners are a co-partnership registered as such under the laws of the Territory of Hawaii and doing business under the name of Island Broadcasting Company (R. 55). The partnership, during the period involved, owned and operated radio station KPOA, located in Honolulu, Territory of Hawaii, for which it held a license from the Federal Communications Commission. KPOA commenced broadcasting on October 15, 1946 (R. 65). It is a 5000 watt Class III station (R. 67-68).

For the period October, 1946 to and including November, 1947 the partnership returned for taxation under Chapter 101 its broadcasting income, and paid the tax thereon, without claiming any exemption or deduction for interstate commerce (R. 65). For December, 1947 and thereafter, while continuing to report income from broadcasting, the partnership claimed exemption of all such income on the ground of it being from "interstate commerce" (R. 65-66). The contested assessments thereafter were made by the Tax Commissioner.

The Tax Commissioner in his answer and counterclaim (R. 27-35) asserted that the gross receipts assessed for taxation were derived from the transmission of KPOA broadcasts to the radio audience in the Territory of Hawaii, that KPOA does not reach an audience outside the Territory of Hawaii with effective and satisfactory service that is of commercial significance in the sale of radio time, that sponsors purchasing radio time on KPOA do not do so with a view to reaching an audience outside the Territory of Hawaii, that where sponsors have occasion to reach an audience outside

the Territory a short-wave relay is employed, and that the Tax Commissioner excluded from the tax assessments the receipts from the programs transmitted by short-wave relay. The Tax Commissioner asserted that the tax was a lawful government realization (R. 27-33).

The case came on for trial without a jury, and evidence was received January 3, 1952 to January 11, 1952 (R. 56). On January 15, 1952 the Court announced from the bench its findings of fact and conclusions, which were incorporated in the written decision entered January 28, 1952 (R. 36-47).

The trial court found that reception outside the Territory was not sufficiently dependable and effective to be of value for commercial purposes, and concluded that, except for the short-wave relays, appellants made their money from their broadcasting to the Hawaiian audience, and that the radio audience outside the Territory is not a factor in the selling or buying of radio time on station KPOA where no short-wave relay is employed (R. 39, 44-46). The trial court noted that the two and one-half per cent tax was of general application in the Territory, and held that the petitioners had not shown the court that the tax was such a burden upon the station as to interfere with its operation (R. 40). The court concluded that the tax had been properly interpreted and applied by the Tax Commissioner and that the tax law and assessments made thereunder were valid (R. 46).

The case was taken to the Supreme Court of Hawaii by writ of error (R. 48). That Court held that the trial court's findings were supported by the evidence, which it reviewed (R. 58-60, 65-89, 100, 113), that the tax assessed was neither upon proceeds from interstate commerce, nor a burden upon interstate commerce (R. 100, 113-114), that the tax was upon the business of radio broadcasting "Within this Territory," measured by the gross income of such business and excluding broadcasts between points in the Territory and points outside the Territory (R. 116-117), and that the

Tax Commissioner had assessed the tax accordingly by excluding receipts of KPOA from short-wave relays, being broadcasts between points in the Territory and points outside the Territory, and by including and thus subjecting to the tax only receipts of the station from its "standard wave" broadcasts which latter are of commercial value only within and not outside the Territory (R. 117, also R. 58-60, 100-101, 11[illegible]). The decision and judgment of the trial court were affirmed (R. 120-121).

Torkel Westly, who was Tax Commissioner when the case arose, having resigned from said office, Earl W. Fase, the incumbent Tax Commissioner, was substituted (R. 121-122), and judgment of the Supreme Court was entered accordingly (R. 123). Said Earl W. Fase, the present Tax Commissioner, is the respondent here.

Petitioners appealed to the Court of Appeals for the Ninth Circuit under 28 U.S.C. 1293. In that Court petitioners applied for an order dispensing with the printing of the record (App. 12), but this was denied (App. 16). Petitioners did not designate any of the evidence for inclusion in the printed record (App. 17).

The Court of Appeals, after noting that the evidence was not before it and that in reality the petitioners were contending that it appears from the pleadings themselves that the tax is invalid (R. 138, Pet. App 12A-13A), stated that: "The question to determine is whether the tax burdens interstate commerce." (R. 139; Pet. App. 13A). Citing *Pacific Telephone and Telegraph Co. v. Tax Commission*, 297 U.S. 403, the Court noted that "even where the same instrumentalities are used in inter and intrastate commerce, a tax on the local business based upon the gross income has been sustained." (R. 141; Pet. App. 16A). Comparing that case with the present case, the Court said: "There, as here, there was no proof offered that the tax did, in fact, burden interstate commerce." (R. 141; Pet. App. 16A). The Court quoted the holding in *Pacific Telephone and Telegraph Co.*

that: "No decision of this Court lends support to the proposition that an occupation tax upon local business, otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable." (R. 141-142; Pet. App. 17A), and noted that this case was interpreted in *City of Chicago v. Willett Co.*, 344 U.S. 574, 578, as requiring an affirmative showing by the taxpayer that the tax in fact burdens interstate commerce in a case in which, although the taxpayer's intrastate and interstate activities are inseparable, the tax is not laid inseparably on both (R. 145; Pet. App. 21A).

Pacific Telephone and Telegraph Co. was deemed by the Court below to have decisive significance because it was decided at the same term as *Fisher's Blend Station v. Tax Commission*, 297 U.S. 650, a case involving a gross receipts tax upon radio broadcasting. In *Fisher's Blend*, said the Court below, "the parties stipulated that the case might be submitted upon the facts recited in the complaint," and "there was nothing in the complaint to show that an attempt was made to segregate the receipts derived from local broadcasts." This was "the gist of the opinion," the Court below held, citing pages 655-656 of the opinion in 297 U.S. (R. 142-143; Pet. App. 18A).

Contrasting the stipulated facts in *Fisher's Blend Station* with the facts before it, the Court below held that the principle of *Pacific Telephone and Telegraph Co.* required affirmance of the Supreme Court of Hawaii, on the ground that:

> "The trial court found that the station operates within the Territory and the Supreme Court of Hawaii, in sustaining the judgment of the trial court, made special reference to the findings and found that any income from short-wave relays was specifically excluded, saying:
>
> "The tax is upon the business of radio broadcasting "within this Territory," measured by the gross income of such business. This excludes broadcasts be-

> tween points in the Territory and points outside the Territory. * * * The tax commissioner has assessed the tax accordingly by excluding therefrom receipts of KPOA from short-wave relays being broadcast between points in the Territory and points outside the Territory and by including and thus subjecting to the tax only receipts of the station from its "standard wave" broadcasts, which latter are of commercial value only within and not outside the Territory.' *McCaw v. Fase*, supra, at p. 715 [sic, correctly 175].
>
> "We, therefore, have an authoritative finding by a territorial court approved by the highest court of the Territory which distinctly says that not only the statute itself, but also the practices under it, limit the tax to income from local activities only." (R. 143; Pet. App. 19A.)

Dismissal for want of a substantial federal question of the appeal taken in *Vinsonhaler v. Beard*, 338 U.S. 863, 896, from the decision of the Supreme Court of Arkansas in *Beard v. Vinsonhaler*, 215 Ark. 389, 221 S.W. 2d 3, was deemed significant by the Court below, inasmuch as the statute sustained by the Arkansas Supreme Court imposed a license tax upon the business of intrastate radio broadcasting. Since that appeal was taken under 28 U.S.C. 1257 (2), this Court was bound to entertain the appeal if such a tax violated any constitutional provision, the Court below noted (R. 146-147, Pet. App. 22A-23A).

As to federal licensing and regulation of radio stations, the Court below held that the stations did not thereby become agencies of the Government immune from state taxation, and that regulatory measures are in a different category from purely taxing measures (R. 143-144; Pet. App. 9A-20A). Said the Court below: "the character of radio communication does not prohibit a tax upon the state business any more than the interstate character of railroads, power companies, telephone, telegraph and express compa-

nies stands in the way of valid tax statutes of the type under discussion." (R. 144; Pet. App. 20A).

In the Supreme Court of Hawaii the petitioners had waived certain assigned errors, as that Court held (R. 60-61). These were not included in the Statement of Points on Appeal filed in the Court of Appeals (R. 132, incorporating R. 125-129). Nevertheless petitioners now include them in their petition (Pet. 5, 8, 28, 34-37). This will be brought out in the argument below.

SUMMARY OF ARGUMENT

Radio Station KPOA does not have interstate coverage that is of value in the sale of radio time. Its receipts are derived from the transmission of broadcasts to the Hawaiian audience. This transmission to the audience in the Territory may be taxed, measured by the receipts therefrom. Only such receipts have been taxed.

When a short-wave relay is employed the Hawaiian broadcasts are carried to an out-of-the-Territory audience, but the receipts from such short-wave relays have not been taxed, nor has the tax been imposed upon mainland broadcasts simultaneously received by the Hawaiian audience through the use of a short-wave relay. Hence all of the taxed receipts are from broadcasts of the Hawaiian station to the Hawaiian audience.

The local business is taxed along with other local business, and the tax does not discriminate against interstate commerce. Because the tax is not upon interstate communication the possibility of a tax being imposed at an out-of-state point of reception does not enter into the case, and the multiple burden test has no significance here.

The station's intrastate business from which it derives the taxed receipts need not be separable from the untaxed interstate commerce; since the tax is solely on the intrastate business and confined thereto by being measured by the receipts therefrom it would have to be affirmatively shown

that the tax is so burdensome as to actually interfere with interstate commerce, but this has not been shown. Also applicable here is the rule that interstate aspects of a business that are merely incidental may be disregarded.

The scope of federal regulation is not the yardstick for this case. That Congress has not pre-empted the field of radio broadcasting to the exclusion of state taxing powers, any more than the fields of telegraph and telephone communication, has been recognized in section 606 of the Communications Act of 1934. The doctrine of implied tax immunity is of very narrow application.

The decision below follows well established principles, laid down by this Court in a series of decisions of which the following are the most important:

Pacific Telephone and Telegraph Co. v. Tax Commission, 297 U.S. 403, holding that in the case of a telephone or railway company having inseparable intrastate and interstate activities, a tax measured by a percentage of the gross income drawn solely from intrastate business is not laid inseparably upon both, and it is for the taxpayer to show affirmatively that the tax, though directed at intrastate business only, in fact burdens interstate commerce.

Fisher's Blend Station v. Tax Commission, 297 U.S. 650, establishing the principle that radio transmission in all essentials is like transmission by telephone or telegraph, and holding in a case coming up on stipulated facts that as it did not appear that any of the taxed income was allocable to intrastate commerce the tax as a whole must fail.

Vinsonhaler v. Beard, 338 U.S. 863, rehearing denied 338 U.S. 896, dismissing for want of a substantial federal question the appeal from *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3, and thereby upholding a tax upon the business of intrastate radio broadcasting.

The petition presents no grounds for certiorari. That it disregards the applicable rules of appellate procedure also is a matter covered by the argument.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR IN ACCEPTING THE FINDINGS OF THE TRIAL COURT AFFIRMED BY THE SUPREME COURT OF HAWAII.

The trial court (the Circuit Court of the Territory of Hawaii, First Circuit) made findings and conclusions, as follows:

> "* * * with the exception of short-wave relays, KPOA makes its money with the Hawaiian audience in view and not the audience outside the Territory." (R. 39, 58.)
>
> "* * * the complainants have not shown to this Court that this 2½% gross income tax, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station as to interfere with its operation." (R. 40, 58-59.)

Also numbered findings and conclusions, of which the following are the most important:

> "1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage." (R. 44, 59.)
>
> "2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience." (R. 45, 59.)
>
> "3. Where a KPOA broadcast is directed to an out-of-the-Territory audience a short-wave relay is used, as in the case of the program 'Hawaii Calls.'" (R. 45, 59.)
>
> "4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by short-wave relay or brought into the Territory by short-wave relay." (R. 45, 59.)
>
> "8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered." (R. 45-46, 60.)
>
> "9. The radio audience outside the Territory of Ha-

waii is not a factor in the selling or buying of radio time on Station KPOA, where no short-wave relay is employed." (R. 46, 60.)

"11. The territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid." (R. 46, 117.)

By addenda to the petition's appendix, with interpolated remarks and underscoring, petitioners' counsel has endeavored to make it appear that the numbered findings and conclusions were not the trial court's (Pet. App. 49A-50A). The fact is that these numbered findings and conclusions had been proposed by the Tax Commissioner (respondent here), and had been served and filed on January 11, 1952 (Record of Supreme Court of Hawaii, pp. 127-130, App. 18-21). On January 15, 1952 at the conclusion of the trial and after hearing argument, the Court approved them and announced from the bench that "they may be incorporated in the final decision as part of the Court's findings." (Pet. App. 40A, lines 1-8, Transcript of trial court proceedings p. 754, Record of Supreme Court of Hawaii, p. 143). Accordingly this was done, and the numbered findings and conclusions are a part of the Court's decision entered January 28, 1952 (R. 44-46; Pet. App. 49A-50A). The matter is considered in more detail in a footnote.[4]

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[4] On January 15, 1952, at the conclusion of the trial and after hearing argument, the trial court announced its decision from the bench. This is hereinafter referred to as the "oral decision."

The findings of the Court announced in the oral decision included the unnumbered findings and conclusions above set forth (Pet. App. 36A, line 25, to 37A, line 2, Transcript of trial court proceedings, p. 750, lines 17-26, Record of Supreme Court of Hawaii, p. 139, lines 17-26; Pet. App. 39A, lines 18-22, Transcript of trial court proceedings, p. 753, lines 15-19, Record of Supreme Court of Hawaii, p. 142, lines 15-19. At the last cited point there is a clerical error, in that "2%" should read "2½%." There is no 2% rate (App. 4-6). This was corrected when the written decision was entered).

The oral decision also approved (Pet. App. 40A, lines 1-8, Transcript of trial court proceedings, p. 754, Record of Supreme Court

The Supreme Court of Hawaii (R. 58-60, 89, 100, 113, 117) affirmed the trial court's findings and conclusions, after reviewing at length (R. 65-89, 100, 113) the evidence consisting in some 600 pages of testimony and 80 exhibits.

After adverting to the affirmance of the findings by the Supreme Court of Hawaii (cited to 40 Haw. 121 at p. 172, same as R. 113) the opinion of the Court of Appeals states:

> "While the appellants have challenged the findings in many respects, they have not brought up any of the evidence. In the circumstances, the presumption of correctness of the findings under Rule 52 (a) of the Federal Rules of Civil Procedure, applies with great strictness. *Richard v. Thompson,* 9 Cir., 1934, 72 F (2) 807, 809; *United States v. Van Dusen,* 8 Cir., 1935, 78 F (2) 121, 122; *Gallagher's Steakhouse v. Bowles,* 2 Cir., 1944, 142 F (2) 530, 531. However, in reality, the appellants are contending that it appears from the

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of Hawaii, p. 143) the numbered findings and conclusions, which previously had been proposed by the Tax Commissioner, and had been served and filed (App. 18-21).

After announcing its decision the trial court ordered the prevailing party to submit a form of written decision (Pet. App. 40A, Transcript of trial court proceedings, p. 754. Record of Supreme Court of Hawaii, p. 143). The form of written decision was brought on for hearing in the presence of counsel for both parties on January 28, 1952. It set forth the findings and conclusions, both those numbered and those unnumbered (R. 39, 40, 44-46, Pet. App. 44A, 44B, 49A-50A). It incorporated by reference (R. 39, Pet. App. 44A) the oral decision rendered at the conclusion of the trial, the transcript of which was filed with the written decision (Record of Supreme Court of Hawaii, pp. 131-144, Transcript of trial court proceedings of January 28, 1952).

The written decision was entered January 28, 1952. It appears in the printed record (R. 36-47), and constitutes the decision of the trial court (R. 58).

The proceedings were set forth by the Supreme Court of Hawaii in its opinion (R. 56. 57-58, infra pp. 36-37). In view of petitioners having in the Supreme Court of Hawaii waived (R. 61) their assignment of error number 1 which related to this (set forth in the record of the Supreme Court of Hawaii, p. 9) and no point in regard thereto having been included in the Statement of Points on Appeal in the Court of Appeals (R. 132, incorporating R. 125-129), these proceedings are not included in the printed record.

pleadings themselves that the tax to which they are subjected is a burden on interstate commerce and not within the power of the Territory of Hawaii to exact." (R. 138, Pet. App. 12A-13A.)

The petition (Pet. 4-5, 10, 34) attacks the statement by the Court of Appeals that the evidence was not before it. This attack is without foundation. The facts are that:

The Rules of the Court of Appeals require the printing of "all of the record which is material to the consideration of the appeal" (Rule 17 (6), C.A. 9, App. 8).

Petitioners obtained no dispensation from the printing requirement, but instead the Court of Appeals denied such dispensation (App. 16).

The petitioners designated none of the evidence for printing (App. 17).

Petitioners presented their case in the Court of Appeals on the theory that invalidity of the tax appeared from the mere fact that petitioners were engaged in radio broadcasting; petitioners attacked the materiality of the findings but not the evidence supporting them (developed below).

The petition (Pet. 4-5, 10, 34) refers to the stipulation made June 8, 1953 in the Supreme Court of Hawaii, printed at pages 4A-5A of the appendix to the petition. This stipulation provided for the transmission by the Supreme Court of Hawaii of the original papers. It took the place of Rule 75 (o) FRCP, and meshed with Rule 10 (1) of the Court of Appeals (App. 6-7). The Rules of the Supreme Court of Hawaii contained no provision for the transmission of original papers.[5]

It was provided by the stipulation that the original papers be sent to the Court of Appeals "as the record on appeal in said Court pursuant to the Federal Rules of Civil Procedure, the Rules of the United States Court of Appeals for the Ninth Circuit and the Rules of the Supreme Court of the

[5] The Rules of the Supreme Court of Hawaii during the period involved appear at 38 Haw. 676-690, 39 Haw. 695-710.

Territory of Hawaii." The stipulation thus incorporated by reference the printing requirements of Rule 75 (l) FRCP and Rule 17, C.A. 9 (App. 7-9).

Counsel for petitioners (Pet. 4-5, 10, 34) now seems to labor under the misapprehension that this stipulation (made in the Supreme Court of Hawaii and approved by its Chief Justice) conferred upon them dispensation from the printing requirements of Rule 17 of the Court of Appeals, and brought petitioners under Rule 10 (2) of the Court of Appeals (App. 7). Of course the Supreme Court of Hawaii could not and did not purport to so order. Nor did the parties purport to so stipulate.

When preparing the case in the Court of Appeals, petitioners' counsel labored under no misapprehension as to the printing requirements or the true purport of the stipulation. This is an afterthought.

Shortly after transmission of the record by the Supreme Court of Hawaii petitioners, appellants in the Court below, filed "Motion by Appellants to (1) To Consolidate this Appeal with Cause No. 12900, (2) To Dispense with Printing of the Record in this Appeal 13920" dated July 30, 1953 (App. 12). Respondent (appellee below) filed objections to this motion (App. 13-15). The Court denied the motion as to both parts (App. 16). "Appellants Designation of Record of Appeal" (App. 17) did not designate any of the evidence for printing.

It will be noted that petitioners' motion in the Court of Appeals for dispensation from the printing requirement stated that "the original papers can be examined and used in this appeal," but made no reference to the stipulation or to the import which it now is supposed to have. Nor did the motion offer to comply with, or state that petitioners had complied with, Rule 10 (2), C.A. 9 (App. 7) requiring that a party allowed to prosecute an appeal without printing shall furnish the original and three legible copies of the transcript in a prescribed format.

Petitioners' motion (App. 12) further stated that "The same territorial act is involved" (as in No. 12900, No. 480 in this Court), and that "the printing of the Record in the appeal would be unnecessarily burdensome and would serve no useful purpose." (App. 12). No. 12900 (No. 480 in this Court) had not reached trial. Petitioners sought to consolidate the two cases. This motion illustrates the theory of petitioners in the Court of Appeals that the evidence was immaterial.

Petitioners' brief in the Court below (R. 164, Supplemental Transcript of Record, not printed) makes no reference to the unprinted evidence and further illustrates the correctness of the statement by the Court of Appeals that "the appellants are contending that it appears from the pleadings themselves that the tax to which they are subjected is a burden on interstate commerce and not within the power of the Territory of Hawaii to exact."

Respondent, at page 9 of his brief in the Court below (R. 165, Supplemental Transcript of Record, not printed), stated that:

> "The trial court made findings of fact, as well as conclusions of law, the pertinent findings being set forth below. The Supreme Court held that the findings were supported by the evidence, which it reviewed (R. 65-89, 100, 113). Since the appellants have failed to include the evidence in the printed record, these findings of fact are not open to argument here. [Citing *Rickard v. Thompson*, 72 F. 2d 807 (C.A. 9th, 1934).]"

Petitioners made no reply, electing not to file a reply brief (R. 166, Supplemental Transcript of Record, not printed). This again illustrates that petitioners were not endeavoring to obtain review of the evidence in the Court of Appeals.

Petitioners' counsel now asserts (Pet. 34) that at the argument before the Court of Appeals it was "demonstrated" to the court that three bound legible copies of the transcript of testimony "were there before the Court." This is not the fact. Petitioners' counsel also asserts (Pet. 4-5) that the par-

ties stipulated that three legible bound copies of testimony be transmitted by the Supreme Court of Hawaii, for which statement petitioners' counsel cites the stipulation printed at pages 4A-5A of the appendix to the petition. Again, this is not the fact. The stipulation included a provision for transmission of "the transcript of evidence." Pursuant thereto, the Clerk of the Supreme Court transmitted the original transcript, as all counsel were advised (App. 10-11). There is nothing to suggest that the Clerk of the Supreme Court ever received more than the original transcript of testimony. The Clerk of the Circuit Court transmitted to the Supreme Court only the original (Record of Supreme Court of Hawaii, pp. 32i, 124, 126, 145-146). But whether or not there were furnished three copies of the transcript of testimony additional to the original would be material only in the event the Court of Appeals had dispensed with the printing requirement; its order denied such dispensation (App. 16).[6]

Since the Court of Appeals did not err in its holding that it was not called upon to review the evidence upon the record before it, the weight of the evidence is not material to the consideration of this petition. However, the overwhelming weight of evidence supporting the trial court's findings appears from the Supreme Court of Hawaii's review of the evidence (R. 58-60, 65-89, 100, 113, 117).

In essence, the trial court's findings were that broadcasts carried by short-wave relay were not taxed, and that KPOA's broadcasts on its standard band have commercial value only within and not outside the Territory. Thus the tax, measured by the gross income from the standard band broadcasts, impinged only on the broadcasts to the Hawaiian audience. The petition (Pet. 10-11) refers to "listeners" outside the Territory, on ships at sea or in places like Samoa, Alaska, or the continental United States distant more than

[6] The attention of the Court is directed to the contemptuous tone of the petition in No. 480 at p. 12, where the misstatements above noted are repeated.

2,000 miles from Hawaii. Such listeners have been referred to by the Supreme Court of Arkansas as "adventitious" listeners.[7] However, the petitioners are in error in asserting (Pet. 11) that the lower courts "blindly" followed the Arkansas case. The matter was covered by the evidence and findings, as now will be shown.

The petition relies on exhibits R-1 and R-2 (Pet. 10-11), described as being letters from "listeners" outside the Territory. These exhibits were included by the Supreme Court of Hawaii in its review of the evidence. In reference to these exhibits the Supreme Court of Hawaii said:

> " 'These distant listeners and this type of mail have no commercial value, * * *.
>
> " 'Mr. Fitkin, whose Station KHON broadcasts twenty-four hours a day on 1380 kilocycles, a frequency that is favorable for sky wave reception (Tr. 364, 365, 446, 562) testified that he received mail of the same type as Exhibits R and T, some of the letters stating that the station was coming in clearly. Mr. Fitkin stated that such letters from places outside the Territory have no sales value, and that out-of-the-Territory reception of standard band broadcasts of Hawaiian stations has no value to a sponsor (Tr. 560-563).
>
> " 'Mr. Mulrony, vice-president of the Advertising Publishing Company and co-licensee with the Advertising Publishing Company of Station KGU, the NBC affiliate in the Territory, who had been operating KGU for thirty years, testified on the basis of his thirty years experience in Hawaii in the radio broadcasting business that "we have never had a dollar beyond the Territory of Hawaii for coverage beyond the Territory" and that no radio audience outside Hawaii had been a factor in the selling and buying of radio time by KGU; that the possibilities of reception outside the

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[7] "* * * It is immaterial equally to the appellees and to their advertisers that a handful of non-residents may listen momentarily to the broadcast before turning to a program of greater interest. Such transient eavesdropping is merely an adventitious consequence of the uncontrollable carrying power of radio waves. * * *"
Beard v. Vinsonhaler, 215 Ark. 389, 391, 221 S.W. 2d 3, 4, appeal dismissed 338 U.S. 863, 896.

Hawaiian Islands had played no part in the competition for business; that he received listener mail of types of Exhibits R and T, some of the mail saying that the station was coming in clearly, and that such mail had no sales value (Tr. 581-585).

" 'Dudley Carroll, Jr., manager of the Honolulu branch office of N. W. Ayer & Co., a national advertising agency with offices in Boston, New York, Philadelphia, Chicago, Detroit, San Francisco and Hollywood, as well as Honolulu (Tr. 593-594), testified that in his experience no radio audience outside Hawaii was a factor in the buying of radio time on Hawaiian stations, that no presentation ever had been made to him by any Hawaiian station that his clients could reach outside of Hawaii on Hawaiian stations (Tr. 598).

" 'Jim Wahl, director of radio at the advertising agency of Holst, Cummings and Myers, with thirteen years' work in radio in Hawaii preceding his advertising agency work (Tr. 608, 609), testified that it was not the practice for an advertising agent to accept, as part of a Hawaiian station's coverage, listener mail of the type of Exhibits R and T coming from points outside the Territory and such mail "is not considered in the time we purchase"; that the radio audience outside Hawaii is not considered a factor in the buying of radio time on Hawaiian stations (Tr. 610, 611, 616)." (R. 85-86.)

It is difficult to understand the statement on page 7 of the petition that the Tax Commissioner solely and without any review decided what was "interstate" or "intrastate" revenue. The findings (R. 39, 40, 44-46), the review of the evidence by the Supreme Court of Hawaii (R. 58-60, 65-89, 100, 113, 117) and the opinion of the Court below (R. 143, Pet. App. 19A) show how this was decided. Perhaps the petition has reference to a concession made in the trial court that: "We either owe this tax, all of it or none of it. It is a question of law."[8]

[8] "MR. DAVIS: Your Honor, at this time, I do not mean to be presumptuous, but I take the position in this case, it might save some time. There is no dispute so far as I know with the figures in this

II. THE DECISION BELOW PROPERLY APPLIES THE DECISIONS OF THIS COURT, AND IS NOT IN CONFLICT WITH OTHER CIRCUITS OR WITH STATE COURTS.

A. Radio broadcasting consists in both intrastate and interstate commerce, hence there is an area for state taxation.

This proposition was foreshadowed in the case of *Fisher's Blend Station v. State Tax Commission,* 297 U.S. 650, 656, 1936, and confirmed when, in *Vinsonhaler v. Beard,* 338 U.S. 863, 1949, rehearing denied 338 U.S. 896, this Court dismissed for want of a substantial federal question, the appeal taken as a matter of statutory right from the state court decision in *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3.

Fisher's Blend Station v. State Tax Commission, supra, arose in a Washington State court, whence it reached the Supreme Court of Washington in 1935 (182 Wash. 163, 45 P. 2d 942) and this Court in 1936 (297 U.S. 650). It was argued by the State of Washington and erroneously held in the state supreme court, that the stations were merely furnishing local facilities and were unlike telegraph and telephone companies because they owned no facilities at point of reception. This Court ruled that radio transmission "in all essentials" is like transmission by telegraph or telephone (297 U.S. at p. 654), and rejected the State of Washington's argument, saying:

> "* * * Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial * * *." (297 U.S. at pp. 654-655.)

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case. We either owe this tax, all of it or none of it. It is a question of law. And before a liability can attach, in view of the pleadings in the case, where we say we owe none and her counterclaim, I think we have not denied the existence of the figures. It is just a matter of law, whether these facts are Inter-State Commerce. * * *" (Transcript of trial court proceedings, p. 580, not printed.)

The Court below followed this case when it said (Statement of the case, supra, pp. 6-8) that the principles applicable to radio broadcasting are those laid down for telephone and telegraph companies in the *Pacific Telephone and Telegraph Co.* case[9] decided at the same term of Court and in fact in the same month as this case. Petitioners reject this case when they argue that a radio station is different because it transmits through "the ether" (Pet. 4, 17, 20-21, 28).

Immediately following the above quoted statement that radio transmission is like transmission by telegraph or telephone, this Court went on to explain:

> "Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensible effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See *Federal Radio Comm'n v. Nelson Bond & Mortgage Co.*, 289 U.S. 266, 279." (297 U.S. at p. 655.)

Petitioners italicize the word "all" in this quotation and present it out of context (Pet. 13, 14). But the fact remains that it was a holding upon the issue presented by the record. That issue was whether broadcasting to an out-of-state audience is intrastate commerce because the broadcasting company owns no facilities at point of reception. The answer is that this is not material, that radio broadcasting companies "in all essentials" are like telegraph and telephone companies.

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[9] 297 U.S. 403.

As noted by the Court below (R. 142-143; Pet. App. 18A) no attempt was made by the State of Washington to segregate the receipts derived from the in-the-state audience. The case went up on a stipulation that it be decided upon the facts alleged in the complaint,[10] among them:

> "That a Clear Channel station is assigned a radio frequency by the Federal Radio Commission which * * * is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States* * * *; that a Regional station is assigned a radio frequency band by the Federal Radio Commission for the effective transmission of radio broadcasting over the zone in which it is located and, therefore, is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the zone in which it is located* * * *."[11] (No. 628, Oct. 1935 term, R. 5.)
>
> "That * * * Stations KOMO and KJR have been and now are engaged in *broadcasting commercially* in said manner * * *; that said broadcasting *has covered said designated areas* * * *, and that such broadcasting *has been continuous and effective* and * * * has furnished an effective and valuable medium of advertising * * *." (No. 628, Oct. 1935 term, R. 5-6.)
>
> "* * * that the gross income from the business * * * arises out of payments made by the National Broadcasting Company, Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, *who desire to reach the listening public in the areas and territories hereinabove described.*" (No. 628, Oct. 1935 term, R. 7.)
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> (Italics added.)

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[10] 297 U.S. at p. 651. Quotations that follow are from the complaint as set forth in the record in the case, No. 628, Supreme Court of the United States, October Term, 1935. The stipulation appears in the court's order printed at pp. 22-23 of that record.

[11] Under the regulations then in effect the United States was divided into five zones.

This Court, after reciting the substance of the foregoing facts which, as the Court noted, were stipulated, said that the business of the company was the transmission of advertising programs from its stations in Washington to listeners in other states.[12] (It is important to note that according to the stipulation both of the stations were designed for and produced commercial service over wide areas and all the advertisers desired to reach this widespread listening public.) Applying the principles of the telephone and telegraph company cases, the decision concluded that the tax then before it:

> "* * * is levied on gross receipts from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail, *Cooney v. Mountain States Tel. & Tel. Co., supra;* cf. *Pacific Tel. & Tel. Co. v. Washington, supra,* * * *." (297 U.S. at p. 656.)

The Court below held that the facts in the present case call for a different result, upon application of the principles applicable in the telegraph and telephone company cases (R. 141-143; Pet. App. 16A-19A).

KPOA is a 5000 watt Class III-A station, on a Regional Channel, and as such according to the Federal Communications Commission Rules and Standards[13] is "designed to render service primarily to a metropolitan district and the

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[12] 297 U.S. at p. 654.

[13] It will be noted that in 1935, at the time of Fisher's Blend, a radio station was governed by rules that differ from the present ones. Under the present Rules and Standards of the Federal Communications Commission (R. 68; 47 C.F.R. part 3, subpart A and appendix beginning at p. 118 of 1949 ed.) the very best station, a Class I station, is designed to render service "over an extended area and at relatively long distances" (47 C.F.R. Sec. 3.22(a)) as compared with "the entire area of the United States," stipulated in 1935. Under the present Rules and Standards a regional station is designed to render service "primarily to a metropolitan district and the rural area contiguous thereto" (47 C.F.R. Sec. 3.22 (c)), as compared with an entire zone stipulated in 1935.

rural area contiguous thereto" (R. 68, quoting from Exs. 1 and 2; 47 C.F.R. Sec. 3.22 (c) and p. 120 of 47 C.F.R. 1949 ed.). KPOA is not engaged in broadcasting commercially outside the Territory, and time-buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience, according to the facts which this record presents (Supra, Point 1). The contrast could not be more complete.

In *Vinsonhaler v. Beard, supra,* this Court dismissed "for want of a substantial federal question," an appeal taken as a matter of statutory right from the decision of the Supreme Court of Arkansas in the case of *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3 (1949). This dismissal of the appeal was on the authority of *Crutcher v. Kentucky,* 141 U.S. 47, cited in *Vinsonhaler v. Beard,* 338 U.S. 863.[14] Rehearing was denied at 338 U.S. 896, despite a petition for rehearing that warned that citation of the *Crutcher* case would give the dismissal of the appeal great significance (pp. 5-6 of Petition for Rehearing in No. 342, October Term, 1949). The jurisdictional statement and petition for rehearing show that the contentions there made were the contentions presented here.

The Arkansas tax was a flat license fee of $250 upon "the business of intrastate radio broadcasting."[15] The Arkansas Supreme Court held that, leaving out of consideration the network programs brought in by telephone relay, at least the local programs were intrastate business, and that the $250 license fee levied on intrastate radio broadcasting

[14] The *Crutcher* case involved express companies and their agents. This Court did not say to what part of *Crutcher* it referred but it is worthy of note that in that case it said: "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." (141 U.S. at p. 59.)

[15] 215 Ark. 389, 221 S.W. 2d 3. The ordinance alternatively levied the tax upon the generating of electro-magnetic waves for the purpose of radio broadcasting, but citation of the *Crutcher* case by this Court shows that the dismissal did not uphold the tax on this alternative ground. See note 14, supra.

thereby was sustained, citing *Postal Telegraph Co. v. Charleston,* 153 U.S. 692.

As a flat license fee, the Arkansas tax was more difficult to sustain than the present tax measured by gross income.[16] Yet this Court found no substantial federal question was presented.

The petition has only this to say about dismissal of the appeal in the *Vinsonhaler* case:

> "In Beard v. Vinsonhaler, 338 U.S. 863, where an appeal was dismissed, there was a *license tax* of only a few dollars involved. Obviously, there was no substantial federal question." (Pet. 22.)

This certainly does not show cogent reason for granting the writ. That this Court already has upheld a state tax upon the business of intrastate radio broadcasting cannot be denied. There is an area for state taxation. If there be doubt as to what that area is in the case of a flat license fee, certiorari in this case will not advance the solution. As to taxes measured by gross receipts, the principles are clear. And if there be doubt as to the application of a gross receipts tax in the case of a radio station so situated as to have broadcasts of commercial value both within and without the State, again we say certiorari in this case will not advance the solution. In the present case of a radio station so situated as to have broadcasts of commercial value only within and not without the Territory, the application of the governing principles is clear.

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[16] *City of Chicago v. Willett Co., supra,* 344 U.S. 574, 578. There have been three flat license fee radio station cases in the highest Court of Georgia, the first decided before *Fisher's Blend* and upholding the tax (*Atlanta v. Oglethorpe University,* 178 Ga. 379, 173 S.E. 110, mentioned in *Fisher's Blend* by way of comparison (297 U.S. at p. 656)), the second (*City of Atlanta v. Southern Broadcasting Company,* 184 Ga. 9, 190 S.E. 594) decided after *Fisher's Blend* and invalidating the tax on the inseparability ground (which in any event is inapplicable to a gross receipts tax), and the third, also decided after *Fisher's Blend,* holding the tax inapplicable upon the stipulated facts (*City of Atlanta v. Atlanta Journal Co.,* 186 Ga. 734, 198 S.E. 788).

Since *Fisher's Blend* the only gross receipts tax cases involving radio broadcasting have been the New Mexico cases. Both a three judge federal court in *Whitmore v. Bureau of Revenue*[17] and the Supreme Court of New Mexico[18] have viewed *Fisher's Blend* as having recognized that radio broadcasting consists in both intrastate and interstate commerce.

KVL v. State Tax Commission, 12 F. Supp. 497, on which petitioners rely (Pet. 13, 17, 20) likewise proceeded on the assumption that both intrastate and interstate business are involved in radio broadcasting. This was a gross receipts tax case decided on the non-separability doctrine which a few months later, in *Pacific Telephone and Telegraph*, was repudiated in so far as taxes measured by gross receipts are concerned. That decision, rendered in March, 1936,[19] immediately superseded the KVL decision rendered in October, 1935.[20] The statement that the *KVL* case was cited in *Fisher's Blend* (Pet. 17) is another misstatement by petitioners' counsel. *KVL* was cited in argument, which makes it significant that this Court did *not* cite it.

B. The business of effecting communications between points within the state may be, and by the Hawaiian statute is, taxed upon the proceeds thereof.

It repeatedly has been held that a state may impose upon telegraph and telephone companies an occupation or privilege tax measured by gross receipts, if confined to the receipts of the intrastate communications.[21] If not so confined the tax is invalid only to the extent that the receipts are de-

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[17] 64 F. Supp. 911, 916, affirmed on another point sub nom *Whitmore v. Ormsbee*, 329 U.S. 668, cited and quoted by the court below, R. 144, Pet. App. 20A.

[18] *Albuquerque Broadcasting Co. v. Bureau of Revenue*, 51 N.M. 332, 184 P. 2d 416, 421, 54 N.M. 133, 215 P. 2d 819. (A connected case in 54 N.M. 165, 216 P. 2d 698, involves only a procedural point.)

[19] 297 U.S. 403.

[20] 12 F. Supp. 497.

[21] *Pacific Tel. and Tel. Co. v. Tax Commission*, 297 U.S. 403, *Ratterman v. Western Union*, 127 U.S. 411; *Western Union Telegraph Co. v. Alabama State Board*, 132 U.S. 472.

rived from interstate communications.[22] The cases cited by petitioners exemplify the same principles.[23]

The tax here applies solely to the intrastate communication to the Hawaiian audience and impinges not at all upon interstate communications. This is true because gross receipts are the measure of the tax, and by that measure the tax is confined to and impinges only upon the business from which the taxed receipts arise.[24] The Court below so held (R. 143; Pet. App. 19A).

As to the provisions of the Hawaiian statute, it is sufficient to refer to Section 5455 (App. 4-6) which is the section of the law attacked in appellants' complaint (R. 5). This imposes a tax upon business in the Territory measured by the gross receipts thereof. It applies to sales, services, and in general all types of business. As applied to radio broadcasting (subsection D, App. 5) it was interpreted by the Supreme Court of Hawaii as follows:

> "The tax is upon the business of radio broadcasting 'within this Territory,' measured by the gross income of such business. This excludes broadcasts between points in the Territory and points outside the Territory. *Pacific Express Company v. Siebert*, 142 U.S. 339, 350.

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[22] *Ratterman v. Western Union, supra.*

[23] *Joseph v. Carter and Weekes Co.*, 330 U.S. 422 (Pet. 27, 30-31) was a case of a stevedoring company that loaded freight on steamers to which it was consigned with the object of effecting its delivery at out-of-state points. The case held, as is made clear by *Canton Railroad Co. v. Rogan*, 340 U.S. 511, 515, and *Western Maryland R. Co. v. Rogan*, 340 U.S. 520, 522, that cargo destined to an out-of-state point begins its interstate journey at the water's edge. Hence, the movement of the freight from the dock onto the vessel is part of the journey to the out-of-state point and cannot be taxed. In an attempt to apply this case petitioners (Pet. 31) misstate the Territory's position; the Territory does not seek to tax interstate communications.

Railway Express Agency v. Virginia, 347 U.S. 359 (Pet. 20) held that a tax, denominated a privilege tax and actually such, could not be applied to exclusively interstate business, the Court at the same time recognizing (347 U.S. at pp. 368-369) that a privilege tax could have been imposed had there been intrastate business as well.

[24] *Pacific Tel. and Tel. Co. v. Tax Commission, supra*, and other cases supra, note 21.

> "The tax commissioner has assessed the tax accordingly by excluding therefrom receipts of KPOA from short-wave relays being broadcast between points in the Territory and points outside the Territory and by including and thus subjecting to the tax only receipts of the station from its 'standard wave' broadcasts, which latter are of commercial value only within and not outside the Territory." (R. 117.)

The Court below regarded this interpretation as authoritative[25] (R. 143; Pet. App. 19A). The principle is one which is applicable to statutory interpretation by the Supreme Court of Hawaii.[26]

The petition presents only that radio broadcasting stands on a different footing. This is met elsewhere in the argument.

C. Intrastate business need not be conducted separately. The tax is valid since it does not in fact burden interstate commerce.

The same radio emanations which carry sound waves to homes within the Territory of Hawaii also pass beyond the Territory. The petition is replete with the argument that this circumstance defeats the Territory's tax. Two established rules eliminate this argument; they are set forth here and in Part D.

The *Pacific Telephone Co.* case, as interpreted in *City of Chicago v. Willett Co.* and followed in the Court below (R. 141-142, 145; Pet. App. 17A, 21A), held:

> "* * * that the tax, though directed at intrastate business only, in fact burdens interstate commerce * * * is for the taxpayer to show affirmatively * * *."
>
> "* * * the tax * * * was measured by a percentage of the gross income drawn solely from intrastate busi-

[25] The Court below cited *Osborne v. Florida*, 164 U.S. 650, 654, and *J. Bacon & Sons v. Martin*, 305 U.S. 380. See also *City of Chicago v. Willett Co.*, 341 U.S. 913 and 344 U.S. 574.

[26] *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383.

> ness. Although the taxpayer's intrastate and interstate activities were inseparable, the tax was not laid inseparably on both." (344 U.S. at p. 578.)

Since this tax is not laid inseparably upon intrastate and interstate business, it is for the taxpayer to show affirmatively a burden on interstate commerce, and there is no room for conjecture (Pet. 21) that the present two and one-half per cent tax might be raised to ten per cent. Likewise, if the petitioners' obligation to carry sustaining programs or other obligations (Pet. 12, 18-19, 22) rendered them incapable of meeting the tax that was for them to show affirmatively. Instead they seek to presume it.[27]

Such evidence as was produced as to KPOA's financial picture was produced by the respondent. It is reviewed by the Supreme Court of Hawaii at R. 66-67 and shows profits over and above the contested tax of more than $85,000 per year. In view of these profits, which are all from intrastate communication with the exception of negligible income (R. 87) from the untaxed short-wave relays, it is sufficient to quote the following from the *Pacific Tel. and Tel. Co.* case:

> "* * * The company's business, both the intrastate and the interstate, was conducted at a profit during the tax period. * * * Not only is the intrastate business (even with the addition of this tax) no burden; it is that branch of the business which makes it financially possible to carry on the interstate. * * *" (297 U.S. at p. 417.)

That the petitioners failed to show any burden on interstate commerce was found by the trial court (R. 40) and affirmed by the Supreme Court of Hawaii (R. 96-97, 100, 113-116, 117). The Court of Appeals concurred (R. 143-145; Pet. App. 19A-21A), and pointed out that the Arkansas

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[27] That petitioners' obligations of public service do not ipso facto confer upon them immunity from the territorial tax is shown in Part G, in answering the argument made in the petition that Congress has pre-empted the field.

court had rejected the non-separability argument and the appeal in that case was dismissed[28] (R. 146-147; Pet. App. 22A-23A).

It is difficult to understand the argument (Pet. 13, 16) that *Pacific Telephone and Telegraph Co.* came up on demurrer. That would not excuse these petitioners from meeting their burden of proof in the present case which went to trial. However, the fact is that all three cases decided at 297 U.S. 403 (herein referred to by the name of the first case) went to trial.[29]

D. Interstate commerce that is only incidental may be disregarded.

The standard band broadcasts, while producing sound waves that pass beyond the Territory, do not produce income from that circumstance. Incidental interstate aspects of a business may be disregarded. *Department of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 255, holding that where the tax was upon an intrastate enameling business the interstate trucking of the customers' stove and refrigerator parts was merely incidental. See also *Tad Screen Advertising v. Oklahoma Tax Commission*, 126 F. 2d 544 (C.A. 10) and note 30, infra.

Petitioners (Pet. 31) misstate the Territory's position when they say that the Territory seeks to ignore reception "whether far or near." The Territory only ignores the far reception that produces no receipts.

E. The "multiple burden" test has no significance where, as here, only intrastate communication is taxed.

Petitioners argue (Pet. 4, 15-16, 27, 30-31) that the possibility of a multiple burden on interstate commerce invalidates a state tax, and that this rule applies here. They rely on *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250.

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[28] *Vinsonhaler v. Beard*, supra, 338 U.S. 863, 896.

[29] See the opinions appealed from: 183 Wash. 33, 697, 698; 48 P. 2d 931, 938.

That case involved a gross receipts tax upon the advertising revenues enjoyed by the publisher of a magazine known as Western Live Stock. The magazine had an interstate circulation to an out-of-state reading public. The question was whether this interstate circulation of a magazine published in the state of New Mexico, the taxing state, was akin to interstate communication by radio broadcast stations. The court held that it was not comparable, and reiterated the rule that the business of broadcasting is comparable to the business of a telegraph or telephone company. Under the principles applicable to such companies and to KPOA, a tax may be imposed upon intrastate communications, to the audience within the state, measured by the receipts derived from broadcasting to the in-the-state audience. Such is the present tax.

Petitioners' argument assumes that the point of reception of the taxed broadcasting is in another state, then argues that if a tax were imposed at the point of reception there would be a multiple burden upon interstate commerce. The assumption is false and the argument accordingly invalid.

Another aspect of the *Western Live Stock* case[30] is the holding that the mere interstate transmission of advertising materials prepared by out-of-state advertisers has no significance in determining the taxability of the advertising revenues. This is an illustration of the rule that incidental interstate aspects of a business may be disregarded (Part D, supra).

F. The tax is not discriminatory.

This is not a case of a discriminatory tax directed against interstate commerce though in terms tied to a local incident. The territorial tax is of general application,[31] as held by the

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[30] 303 U.S. at pp. 253-254.

[31] Section 5455 (App. 4-6). The prevailing rate is the 2½% rate applicable here. Lower rates are allowed in certain categories (manufacturing, producing, wholesaling) where a resale and further tax will ensue.

trial court and the courts below (R. 40, 58-59, 100, 138; Pet. App. 13A).

Petitioners' argument of discrimination (Pet. 3-4, 27) asserts only that some stations may have broadcasting that is of commercial value outside the state and not taxable upon the receipts therefrom, while others have only taxable receipts. But this overlooks the obvious answer that the discrimination, if any, is in favor of interstate commerce, not against it.

G. The scope of the regulatory authority of the Federal Communications Commission is not the yardstick in this case. Tax exemption of all that Congress has regulated is not to be implied. Congress has not pre-empted the field to the exclusion of state taxing power.

Petitioners seek to apply as the yardstick for this case the scope of federal regulation (Pet. 3, 4, 9, 10, 11-12, 21-27, 28, 29-30, 33-34, 37-38). Under this argument, whatever Congress regulates ipso facto is immune from state taxation. The courts below rejected this argument (R. 94-96, 100-103, 105-107, 110-113, 143-144; Pet. App. 19A-21A). Its rejection is called for by the dismissal of the appeal in *Vinsonhaler v. Beard*[32] for want of a substantial federal question.

This Court repeatedly has stated that the demarcation between interstate and intrastate commerce from the standpoint of regulatory authority is not the same as from the standpoint of taxation. In *Kirschbaum Co. v. Walling*,[33] it was said:

> "* * * enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce. * * *"

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[32] 338 U.S. 863, rehearing denied 338 U.S. 896, pp. 24-25 supra.
[33] 316 U.S. 517, 521.

Conversely, in *Binderup v. Pathe Exchange,*[34] this Court said:

> "It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause."

By section 301 of the Communications Act of 1934 (47 U.S.C.A. 301, Pet. App. 2A),[35] Congress has exerted not only its regulatory power over interstate and foreign commerce but also its power over matters *affecting* interstate or foreign commerce. Moreover, Congress has exerted the power to govern the territories, which of course is not dependent on the transaction of interstate commerce; neither the existence of this power to govern the territories nor its actual exercise by Congress[36] implies exclusion of the territories from the field. Congress also has exercised its maritime powers, as shown by the reference in the act to "any vessel" but this indicates no pre-emptive intent.[37]

By contrast with section 301 setting forth the scope of the act, the definition of "interstate communication" (47 U.S. C.A. 153 (e), App. 1-2) is much narrower. By this definition interstate communication means communication from a state or territory to another state or territory. Thus, Congress has not purported to say that what it has regulated is all of it interstate communication.

Whether or not all that Congress has regulated could be exempted by it from state taxation, Congress has not done

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[34] 263 U.S. 291, 311.

[35] Section 301 of the Communications Act of 1934 (47 U.S.C.A. Sec. 301, Pet. App. 2A) includes in the scope of the act the transmission of energy or communications by radio:

From a state or territory to another state or territory.

From a state or territory to a foreign country or any vessel.

Within a state, whenever the effects of such use extend beyond the borders of the state or interference is caused thereby.

Within a territory, from one place in the territory to another place in the territory.

[36] *Puerto Rico v. Shell Co.,* 302 U.S. 253, 259.

[37] *Standard Dredging Co. v. Murphy,* 319 U.S. 306, 310.

so and the case falls within the rule that a congressional grant of immunity from state taxation will not be implied and exists only when granted in plain terms.[38]

That a radio station is not a federal instrumentality appears from this Court's decision that a radio station must qualify to do business under state laws,[39] that mere holding of a federal license does not convert the licensee into a federal instrumentality or confer tax immunity,[40] and that the same is true even though the federal government grants the privilege of operating in consideration of obligations of public service under federal supervision.[41]

Obligations of public service were involved in the case of *Williams v. Talladega*, 226 U.S. 404,[42] which concerned a telegraph company having, under Act of Congress, the privilege of using military and post roads of the United States, and by the same Act obligated to carry government messages at reduced rates and in priority to all other messages; this Court held that notwithstanding the company was subject to those duties of public service, it was subject to tax upon

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[38] *Oklahoma Tax Commission v. Texas Co.*, 336 U.S. 342, 365-366.

[39] *Whitmore v. Ormsbee*, 329 U.S. 668, aff'g 64 F. Supp. 911, 916-917.

[40] *Federal Compress & Warehouse Co. v. McLean*, 291 U.S. 17, 22, upholding a state license tax for the privilege of operating a warehouse licensed by the United States; *Broad River Power Co. v. Query*, 288 U.S. 178, 180, upholding a state tax on the production of electric power by a water power plant licensed by the United States.

[41] *Buckstaff Co. v. McKinley*, 308 U.S. 358 (1939), holds that a company operating a bath house situated on the United States government reservation known as Hot Springs National Park, and operated solely by virtue of a lease from the Secretary of the Interior, under which the United States government controlled the number of baths, the charges to the public, the qualifications of employees, the maintenance and care of the premises, and the manner in which patronage might be solicited, nevertheless was not an instrumentality of the United States within the meaning of a law exempting such instrumentalities from tax. The court cited *Federal Compress & Warehouse Co. v. McLean, supra.*

[42] See also *Postal Telegraph Co. v. Charleston*, 153 U.S. 692, upholding a city license tax on a telegraph company having, under Act of Congress, the privilege of using the post roads coupled with obligations of public service, and see other cases cited in the *Williams* case.

the transmission of private messages effected intrastate, though it could not be taxed upon its government business.[43] The point involved in *Williams v. Talladega, supra,* was clarified in relation to radio stations by the Act of January 26, 1942 (56 Stat. 18, c. 18), amending section 606 of the Communications Act of 1934, 47 U.S.C. Supp. 606 (App. 2-4).[44]

The pre-emption argument was rejected in *Braniff Airways v. Nebraska Board,* 347 U.S. 590, 594-597, even though the Civil Aeronautics Act of 1938 (49 U.S.C.A. 176(a)) declared the intention to exercise "exclusive national sovereignty." The Communications Act of 1934 (47 U.S.C.A. 151-609) contains no such declaration.

Petitioners insist that the United States owns "the ether" (Pet. 4, 17, 20-21, 28). Whether this is so or not has no bearing, since those using government property are taxable

[43] There is nothing in this case as to the taxation of government business. Therefore there is no occasion to inquire whether the holding in the Williams case as to implied tax immunity of government business is good law today.

[44] Section 606 is the section which provides in subsection (c) thereof, that in time of national emergency or disaster the President may take over the regulation of any radio station, or may close it, or may authorize the use of the station by any governmental department upon just compensation to the owners. By the Act of January 26, 1942 there was added subsection (g) (App. 3-4), which provides that nothing in the above cited subsection (c) "shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, * * *" The word "States" includes the territories, as provided in 47 U.S.C. Supp. 153(v) (App. 2).

The congressional committee reports show that this provision of the Act of January 26, 1942 was taken from Public Resolution No. 38, 65th Cong. (40 Stat. 904, c. 154), which authorized the President to supervise or take possession and control of telegraph, telephone, cable and radio systems during World War I; the Act of January 26, 1942 was deemed clarifying in nature (H.R. Rep. 1546, 77th Cong., 1st Sess.; Sen. Rep. 945, 77th Cong., 2d Sess.). It thus appears that Congress, instead of pre-empting the field to the exclusion of state and territorial taxation, in 1942 took steps to nail down the principle that radio broadcasting is the same as telegraph and telephone communication.

upon the business so done unless Congress enacts otherwise.[45] Ownership of the airways was discussed in *Braniff Airways, supra,* but that was in interpreting the declaration of "exclusive national sovereignty" made in the Civil Aeronautics Act.

National Broadcasting Company v. United States, 319 U.S. 190 (Pet. 17, 23-24), and *Dumont Laboratories v. Carroll,* 184 F. 2d 153 (C.A. 3rd) (Pet. 18, 21) are regulation cases, as are the remaining cases cited in the petition.

III. THE PETITION PRESENTS NO GROUNDS FOR CERTIORARI.

The "questions presented" numbered 1-10 (Pet. 2-4) also 12 (Pet. 5) have been met by the argument above presented, which shows that the tax has been confined to the broadcasting to the Hawaiian audience, that under well established principles it is valid when so confined, and that the Court of Appeals did not err in accepting the findings of the trial court affirmed by the Supreme Court of Hawaii.

The petition's "question" No. 11 (Pet. 5) is restated in the argument in two parts, 11 (a) and 11 (b) (Pet. 34-37). 11 (a) reiterates the attack made throughout the petition (Pet. 5, 8, 28, 35, 38) upon the procedure followed in the trial court in the rendering of the decision. That procedure, as stated in the opinion of the Supreme Court of Hawaii, was as follows:

> "At the outset of the trial the parties had submitted to the trial court memoranda of law and the trial court heard argument on January 14, 1952. On January 15, 1952, the trial judge, from the Bench, made pronouncements—since referred to as an 'oral decision'—wherein he expressed conclusions determinative of the case in

[45] *Wilson v. Cook,* 327 U.S. 474, upholding a state privilege tax upon persons severing timber from the national forest reserves under contract with the government; see also *Williams v. Talladega,* supra, 226 U.S. 404, involving a telegraph company having under R.S. 5263-5264 the right to use the public domain.

favor of the tax commissioner and against the Complainants." (R. 56.)

"Findings and conclusions proposed by the Tax Commissioner, which had been served and filed on January 11, 1952, were, at the conclusion of the trial, to wit, in pronouncements from the Bench on January 15, 1952, approved by the trial court, and the submission of a written decision by the prevailing party was directed. Following a hearing upon the form of decision, a written decision was entered and filed on January 28, 1952. It incorporated by reference the prior pronouncements by the trial judge, or so-called 'oral decision,' and set forth the findings and conclusions that had been requested and approved, together with other findings and conclusions announced from the Bench." (R. 57-58.)

Petitioners' attack upon this procedure has been covered at page 12 and in note 4, supra. As there stated, in the Supreme Court of Hawaii petitioners waived the error which they had assigned in this regard and in the Court of Appeals did not include it in the Statement of Points on Appeal. In view of this, no further argument is presented at this point.

11 (b) argues (Pet. 7-8, 35-37) against the penalties added to the tax for delinquency in payment. Much of this argument has to do with the companion case, No. 12900 in the Court below (No. 480 in this Court), and accordingly is there answered.

In the Supreme Court of Hawaii the delinquency penalties and interest were the subject of assignment of error 33 (set forth in the record of the Supreme Court of Hawaii p. 16). This assignment of error was waived (R. 61, 117). No point in regard thereto was included in the Statement of Points on Appeal in the Court of Appeals (R. 132, incorporating R. 125-129). In view of this we deem it sufficient to quote from the opinion of the Supreme Court of Hawaii:

"Although, as we have said, supra, the complainants' assignment of error number 33 has been waived by the

non-inclusion thereof in their specifications of error—and, also, their failure to present either argument or authorities pertinent thereto—but, nevertheless, to avoid any possible uncertainty which might arise because of our failure to consider whether interest and penalties should be added to a delinquent tax, we declare that the rule of law is that interest and penalty shall be added to a tax lawfully payable, whenever there has been failure to pay such tax when due, and same has become delinquent, the interest and penalty automatically following the former pursuant to statutory provisions. Section 5463, Revised Laws of Hawaii 1945, as amended by Act 253 of the Session Laws of Hawaii 1945.

"Further, there is a well-established rule that where a tax law provides for penalties and interest, one who contests the tax does so in peril of the penalties and interest, and is liable for penalties and interest upon such amount unpaid as is found to be legally due.

"See Spencer v. Babylon R. R. Co., 250 Fed. 24 (C.A. 2d), a case arising in New York; Washington Water Power Co. v. Kootenai County, 270 Fed. 369, as modified 273 Fed. 524 (C.A. 9th), a case arising in Idaho; State of California v. Hisey, 84 F. 2d 802, 805 (C.A. 9th); State v. Holly Sugar Corp., 57 Wyo. 272, 116 P. 2d 847; State v. Great Atlantic and Pacific Tea Co., 190 La. 925, 183 So. 219, cert. denied 305 U.S. 637; Citizens' Waterworks v. Hughes, 362 Ill. 136, 199 N.E. 265, and People ex rel Stuckart v. Chicago etc. Ry. Co., 270 Ill. 477, 110 N.E. 720; Brittain & Henry v. Robertson, 120 Miss. 684, 83 So. 4, and Hamel v. Marlow, 171 Miss. 559, 157 So. 905; Rixeys Executors v. Commonwealth, 125 Va. 337, 99 S.E. 573, 101 S.E. 404; Power v. City of Detroit, 139 Mich. 30, 192 N.W. 288; Western Union Tel. Co. v. State, 64 N.H. 265, 9 Atl. 547, and Winnipiseogee Lake Mfg. Co. v. Gilford, 64 N.H. 514, 15 Atl. 137; Cedar Rapids & M.R. Co. v. Carroll County, 41 Iowa 153, 191; Jaggar v. David, 121 Kan. 737, 250 Pac. 260." (R. 117-119.)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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